IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1012

GULF OIL CORPORATION, *et al.*,

Petitioners,

vs.

COPP PAVING COMPANY, INC., *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion for Leave to File a Brief Amicus Curiae on Behalf of American Building Maintenance Industries; Motion for Permission to File Said Brief Late; and Brief Amicus Curiae.

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Motion for Leave to File a Brief Amicus Curiae on Behalf of American Building Maintenance Industries; Motion for Permission to File Said Brief Late.

The undersigned on behalf of American Building Maintenance Industries moves the Court:

1. For leave to file the attached brief as amicus curiae and

2. Permission to file said brief on or before October 21, 1974, notwithstanding its late filing.

On Tuesday, October 15, 1974, the undersigned received from the Department of Justice the brief for the United States as amicus curiae herein. Therein, the United States showed that its purpose in filing the brief was to affect the outcome of its appeal in *United States*

v. American Building Maintenance Industries. Only by the filing of an amicus curiae brief on its own behalf may American Building Maintenance Industries respond to the arguments of the United States asserted in its amicus curiae brief. Because the United States elected to file its brief at such a late date, it has not been possible for American Building Maintenance Industries to prepare its attached response for filing earlier than October 21, 1974.

The Gulf Oil case is scheduled for argument on October 21, 1974.

Respectfully submitted,

MARCUS MATTSON,
ANTHONIE M. VOOGD,
Attorneys for American Building Maintenance Industries.

Of Counsel:
LAWLER, FELIX & HALL.

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Brief for American Building Maintenance Industries as Amicus Curiae.

Opinions Below.

The Court of Appeals' opinion (Pet. App. B) is reported at 487 F.2d 202 (9 Cir. 1973), and the opinion of the District Court (Pet. App. A) is not officially reported.

Jurisdiction.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and upon the petition for a writ of certiorari filed on December 28, 1973, and granted on March 25, 1974.

Statutes Involved.

The pertinent statutory provisions involved are set forth at pages three to five of the petitioners' brief on the merits.

Questions Presented.

By way of answer to the amicus curiae brief of the United States, American Building Maintenance Industries ("ABMI") responds to the following:

> Whether the acquisition of the stock of a corporation not "engaged also in commerce" may be subject to the prohibitions of Section 7 of the Clayton Act.

Interest of ABMI.

ABMI is appellee in the case of *United States of America v. American Building Maintenance Industries*, No. 73-1689, now pending before the Court on appellee's motion to affirm the judgment of the United States District Court for the Central District of California. The judgment of the District Court dismissed the Government's action under Section 7 of the Clayton Act attacking ABMI's acquisition of certain janitorial service corporations. The District Court found, *inter alia*, that such acquisitions were not of corporations "engaged also in commerce" as required by Section 7 of the Clayton Act because the acquired corporations rendred janitorial services solely within a single state, using for that purpose labor obtained in that state and supplies purchased in that state.

On October 15, 1974 ABMI received from the Department of Justice a copy of the brief of the United States as amicus curiae in this, the Gulf Oil case. The avowed purpose of the brief of the United States is to affect the outcome of its appeal in *United States v. American Building Maintenance Industries*. This Brief for American Building Maintenance Industries as Amicus Curiae is ABMI's sole opportunity to respond to the amicus curiae brief of the United States. Argument in the Gulf Oil case is set for October 21, 1974.

ARGUMENT.

For the purpose of protecting its interest in *United States v. American Building Maintenance Industries* and affecting the decision therein, the United States at the eleventh hour has filed its amicus curiae brief in this action. To serve this purpose the Government relies upon its assertion that in enacting the Clayton Act "Congress intended to exercise the full extent of its constitutional power to regulate commerce." This assertion is patently erroneous. Section 7 of the Clayton Act, both as enacted in 1914 and as reenacted in 1950, applied its prohibitions only to corporations. No acquisition by a natural person, regardless of the extent of his operations, and regardless of the extent or effect of his acquisition is subject to its prohibitions.

In 1914 when Section 7 was initially enacted it moreover did not purport to "exercise the full extent" of congressional power since it applied only to the acquisition of stock. In 1950 when this limitation was eliminated by extending its prohibition also to the acquisition of assets, the limitation of its application only to corporations was continued.

Moreover, in the enactment of Section 7 in 1914 and its reenactment in 1950 Congress explicitly provided that its prohibitions applied only to a corporation "engaged in commerce" whose transaction was with another corporation "engaged also in commerce." Had Congress intended the result urged by the Government here, it would not have provided that both the acquiring corporation and the acquired corporation must be "engaged in commerce." If Congress had intended in Section 7 to exercise "the full extent of its constitutional power" it would have provided that *any*

acquisition by anyone, regardless of the local character of the person or entity from whom the stock or assets were acquired, would be subject to the Section 7 prohibitions if "any line of commerce" was detrimentally affected. Certainly under the Government's premise here Congress had in 1914 and again in 1950 the power to regulate any such acquisition regardless of the activities of the person or entity on the other side of the transaction. But Congress did not do so.

All of this is made even more clear when Section 7 of the Clayton Act is compared with Sections 1 and 2 of the Sherman Act. Section 1 of the Sherman Act explicitly covers "*Every* contract, combination in the form of trust or otherwise, or conspiracy. . . ." Section 2 of the Sherman Act explicitly covers "*Every* person who shall monopolize, or attempt to monopolize . . ." This all inclusive language in the Sherman Act was the basis for this Court's decision in *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944) on which the Government places principal reliance. There the court found that interstate insurance business was subject to the Sherman Act as follows:

> "We come then to the contention, earnestly pressed upon us by appellees, that Congress did not intend in the Sherman Act to exercise its power over the interstate insurance trade.
>
> "Certainly the Act's language affords no basis for this contention. Declared illegal in § 1 is 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . .'; and 'every person' who shall make such a contract or engage in such a combination or conspiracy is deemed guilty of a misdemeanor. Section 2 is not less sweeping. 'Every person' who monopolizes, or attempts to monopolize, or conspires with 'any other person' to monopolize, 'any part of the trade or commerce among the several States' is, likewise, deemed guilty of a misdemeanor. Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." (322 U.S. at 553).

By contrast the language of Section 7 mandates a much narrower coverage:

> "No corporation *engaged in commerce* shall acquire * * * the stock * * * of another corporation *engaged also in commerce*, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (15 U.S.C. §18, emphasis added).

The all inclusive provisions of the Sherman Act were before Congress when it enacted Section 7 in 1914 and when the section was reenacted in 1950. Congress, however, elected to use the severely restricted provisions of Section 7.

The Government indulges in a bootstrap operation. It relies upon Sherman Act cases to avoid the plain language of Section 7 of the Clayton Act and seeks to

apply Sherman Act decisions to this case and to *United States v. American Building Maintenance Industries* without any meaningful reference to the facts. Even in applying one Sherman Act case to another:

> "[T]his court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in light of their facts and of a clear recognition of the essential differences in the facts of those cases and in the facts of any new case to which the rule of earlier decisions is to be applied." *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 562, 579 (1925).

That principle is more than ever applicable where the effort is to apply Sherman Act cases to a Clayton Act claim.

Conclusion.

It is respectfully submitted that ABMI's motion to affirm in No. 73-1689 should be granted. In any event, the Government's case against ABMI should be judged only in that proceeding with adequate opportunity for presentation of issues therein.

Respectfully submitted,

MARCUS MATTSON,
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